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IN THE

Supreme Court of the United States

October Term, 1967

No. 238

TAX REVIEW BOARD OF PHILADELPHIA,
Petitioner,

v.

ESSO STANDARD DIVISION OF HUMBLE OIL AND REFINING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT IN OPPOSITION

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ESSO STANDARD DIVISION OF HUMBLE OIL AND REFINING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania (Appendix D to Petition, p. 32) is reported in 424 Pa. 355, 227 A.2d 657 (1967).

The Opinion of the Court of Common Pleas of Philadelphia County (Appendix C to Petition, p. 24; R. 28a) is not reported.

JURISDICTION

Petitioner claims jurisdiction of this Court exists under 28 U.S.C. § 1257(3). Respondent disputes the claimed jurisdiction, the sole issue in the case being the proper construction of a municipal tax ordinance.

QUESTION

Where no federal revenue or collection procedure is involved and no "federal question" is presented, should this Court grant certiorari in order to render an advisory opinion on a question of state law by reviewing a unanimous final judgment of the Pennsylvania Supreme Court which construed a municipal taxing ordinance and regulation thereunder in such manner as to exclude from "gross receipts" under such ordinance the federal gasoline excise taxes collected by a producer of gasoline from purchasers thereof and remitted to the United States?

STATEMENT

Respondent (hereinafter "Humble") is a producer of gasoline and other petroleum products. As such, it collects, accounts for and pays over to the federal government certain excise taxes, principally the excise tax imposed on the sale of gasoline by Section 4081 of the Internal Revenue Code of 1954, which provides in material part as follows:

> "There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon."

Humble *paid* Philadelphia mercantile license taxes on its receipts from gasoline and other products. It *did not pay* mercantile license taxes on federal

excise taxes which it collected. During the period covered by the municipal assessment (1960, 1961 and 1962) Humble collected from its customers and paid over to the federal government $9,778,902 in federal excise taxes. In respect of such $9,778,902 in federal excise taxes, the Department of Collections of the City of Philadelphia assessed against Humble additional mercantile license taxes in the amount of $29,336.71. In response to such assessment Humble timely filed a petition for a review in the Tax Review Board of Philadelphia (R. 3a), and at a hearing before that Board on December 6, 1963, Humble introduced evidence concerning procedures applicable to the collection and remission of federal excise taxes imposed on sales of gasoline and other petroleum products (R. 4a *et seq.*).

The testimony showed that such taxes are separately listed by Humble on invoices directed to such of its customers as are taxable (Exhibit P-1, R. 22a), that certain users of gasoline and other petroleum products are not taxable (R. 15a; Exhibit P-2, R. 22a), that nontaxable users must provide Humble with exemption certificates or register with their local District Directors of Internal Revenue (R. 15a), and that farmers and other non-highway users from whom excise taxes must be collected by Humble in the first instance may obtain refunds of such taxes from their District Directors (R. 15a, 17a).

The testimony further showed that Humble posts bond as required by law to cover its liability for the

collection of federal excise taxes (R. 18a), that at the end of each month Humble pays over amounts collected to depositary banks and obtains depositary receipts from Federal Reserve Banks (R. 18a), and that at the end of each quarter Humble files an excise tax return and submits depositary receipts with such return as evidence of the transmittal of the taxes collected (R. 18a).

On April 13, 1965 the Tax Review Board (hereinafter "City") denied the petition for review (Opinion No. 65-2; CCH PA. ST. TAX REPORTER 200-535; App. B to Petition, p. 22; R. 23a), and an appeal was duly taken to the Court of Common Pleas of Philadelphia County on May 3, 1965 (R. 1a, 25a).

Argument was heard by the Court of Common Pleas on March 14, 1966, and on April 28, 1966 the Court dismissed the appeal (R. 1a, 27a). The Court's opinion in support of the dismissal was filed October 7, 1966 (App. C to Petition, p. 24; R. 28a).

On June 24, 1966 an appeal was allowed by the Supreme Court of Pennsylvania, which on March 14, 1967 filed its opinion and order, unanimously reversing the judgment of the Court of Common Pleas (App. D to Petition, p. 32).

The City filed its petition for writ of certiorari in this Court on June 12, 1967.

SUMMARY OF ARGUMENT

The City ordinance imposes a 3 mill gross receipts tax upon persons engaged in business in the City. The City regulation provides that the gross receipts tax base shall not include excise taxes such as, "but not limited to," the federal excise taxes imposed on sales of jewelry and furs. These jewelry and fur taxes are not, for City tax purposes, materially distinguishable from the federal gasoline excise tax. It follows that, under the City's regulation, federal gasoline tax collections may not be included in the City tax base. Recognizing this fact at the hearing, the City sought to repudiate its own regulation (R. 10a).

Considering the ambiguity of the City's position regarding its regulation, as well as the Pennsylvania doctrine that Pennsylvania taxing statutes and ordinances must be strictly construed with all doubts resolved in favor of the taxpayer, it was not surprising that the Pennsylvania Supreme Court unanimously endorsed Humble's contention that its liability for City gross receipts taxes should be measured by its receipts from sales of gasoline and should not be inflated to include its federal gasoline excise tax collections.

Obviously, the only question for decision before the Pennsylvania Supreme Court concerned the application of a municipal taxing ordinance and a regulation promulgated thereunder. These matters are of no interest to this Court, which has never attempted to

supervise the local tax affairs of the nation's tens of thousands of municipalities. The Court not only lacks jurisdiction, it lacks competence in this field as well; for it cannot possibly be conversant with the myriad considerations of state and local law which guide state courts to their decisions.

It is true that in deciding the instant case, the Pennsylvania Supreme Court cited the President and Congress for the proposition that the federal gasoline excise tax is a "user tax." The Pennsylvania Court also referred to the exemption and refund provisions of the federal law in concluding that, *for purposes of applying the municipal ordinance and regulation,* the federal tax should be treated as a sales tax and should not be added to the City tax base.

But the City errs in supposing that such comments by the State Court concerning a federal statute raise a "federal question," much less one which is "of substance" and which requires resolution for "special and important reasons" under Rule 19. The City errs because the State Court's remarks concerning the federal statute relate only to that Court's interpretation and application of state and local law. The State Court's observations will not result in the payment of a penny less or a penny more of federal gasoline excise tax, and will not subject to or excuse from the operation of the federal tax anyone who was not covered or exempted before. Whether the State Court's remarks are correct for some *federal purpose* should be left, in the orderly process of our legal sys-

tem, to a future case in which a "federal question" can be squarely raised, apart from fundamental considerations of local law.

Furthermore, the presence in this case of such fundamental considerations of local law would render advisory any pronouncement by this Court; for such pronouncement could deal at best only with a peripheral issue (the characterization of the federal gasoline excise tax) and could not consider, much less bind the Pennsylvania Court in respect of the core issue, namely the application of the local tax. Nor, *a fortiori*, could such pronouncement bind the courts of other states which have similarly considered, for state and local tax purposes, the interplay of the federal gasoline excise tax with their particular taxes. Consequently, there are no "special and important reasons" for granting certiorari; in fact, there are "special and important reasons" why certiorari should *not* be granted.

The authorities cited by the City certainly do not support the City's argument for certiorari in the present case. They hold that certiorari may be granted where a federal statute has been applied by a state court in such manner as to deprive the petitioner of a title, right, privilege or immunity claimed under a federal statute. The City can claim no such deprivation here, since its rights and privileges arise solely under its ordinance and regulation, the reaches of which may be finally and definitively established only by the State Supreme Court.

The City errs in stating that the holding of the Pennsylvania Supreme Court in this case is not in accord with two cases decided by this Court which were cited by the State Court in support of its decision. In fact, all three cases—two in this Court and one in the State Court—reached the same general conclusion, albeit they considered different excise taxes for different purposes. That conclusion was that excise taxes, although often made payable to the taxing authority by a manufacturer or seller, are not in fact laid upon them but are sales taxes which they collect from their customers upon whom the real onus of the tax falls. This is all the more true of the federal gasoline excise tax in view of the format of the statute and the Congressional characterization.

Accordingly, it is submitted that the Pennsylvania Supreme Court, applying Pennsylvania law as well as properly treating the federal gasoline excise tax as a sales tax, correctly decided the application of the City tax and regulation to Humble's receipts. But even more important than the correctness of the State Court's decision is the fact that finality should be accorded to it because the question decided was one of local law, and there is no basis upon which review by this Court can or should be granted.

ARGUMENT

I. No Federally Created Right, Privilege or Immunity is Here Involved as Would Confer Certiorari Jurisdiction Under 28 U.S.C. § 1257(3); Nor is There Present Any "Federal Question of Substance" Which Requires Resolution For "Special And Important Reasons" Under Rule 19.

A. The matter involves the application of a local taxing ordinance and regulation thereunder; federal revenue and collection procedures are completely unaffected by the State Court's decision.

The City erroneously contends that certiorari jurisdiction exists in the present case by virtue of 28 U.S.C. § 1257(3). This provision empowers the Court to grant a writ of certiorari to review final judgments or decrees rendered by the highest court of a state in which a decision could be had, (a) where the validity of a treaty or statute of the United States is drawn in question, or (b) where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or (c) where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. In turn, this Court's Rule 19 provides in material part that the Court will not grant certiorari except where

there are "special and important reasons therefor" and the case involves "a federal question of substance."

It is evident at a glance that this case does not concern either the validity of a treaty or statute of the United States or the validity of a state statute. It is equally manifest that it does not involve a title, right, privilege or immunity specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. Nor does it pose "a federal question of substance," much less one which requires resolution for "special and important reasons." On the contrary, the single issue in this case is one as to the correct interpretation of a municipal tax ordinance and an administrative regulation promulgated thereunder.

The facts are clear and undisputed. A 1952 Philadelphia ordinance imposes a 3 mill per dollar Mercantile License tax upon the gross receipts of persons engaged in business in Philadelphia.

A regulation issued pursuant to such Philadelphia ordinance provides that the gross receipts tax base shall not include federal, state or local excise taxes which are collected by the taxpayer and remitted to the taxing authority levying the excise tax.

At all times relevant, Humble paid the Philadelphia Mercantile License tax upon its receipts from sales of gasoline. However, in accordance with the Philadelphia regulation, Humble did not pay the Philadelphia Mercantile License tax upon amounts of

federal excise taxes which Humble collected from its customers and remitted to the federal government.

Starting in 1963, the City, despite its own regulation, sought to lay its Mercantile License tax upon Humble's federal tax collections in order to inflate Humble's local tax base by approximately 26%[1].

In its opinion, the Supreme Court of Pennsylvania stated:

> "The question posed by this appeal is, whether that portion of the total sales price (on sales in Philadelphia), which Humble charges the purchaser and later returns to the United States government in payment of the tax, *is part of its gross receipts for mercantile tax purposes, under the pertinent provisions of the Code of the City of Philadelphia.*" At 355. (Emphasis added.)

The Supreme Court of Pennsylvania decided this question of local law in Humble's favor. In doing so, the State Court cited the presumption applicable in Pennsylvania that taxing ordinances must be strictly construed. The State Court also made certain observations concerning the nature of the federal gasoline excise tax. The City objects to these observations in its attempt to have this Court review an adjudication by a State Court on a question of local law.

It should be stressed that, in the adjudication of this local law question, the decision of the State Court resulted in the payment of neither a penny more nor

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[1] Exhibit P-1, R. 22a.

a *penny less of the federal gasoline excise tax, and no one was subjected to or excused from the operation of such federal tax who was not covered by or exempted from it before.*

The interpretation of the federal statute in the Pennsylvania courts was relevant only to the correct application of the Pennsylvania law. Regardless of how the Pennsylvania courts chose to interpret the federal statute—whether as urged by the City or as urged by Humble—the chosen construction could have had no effect upon the application of the federal statute, and no impairment of any right, title, privilege or immunity under that statute could have resulted; and since in fact the Pennsylvania Supreme Court interpreted the municipal ordinance and pertinent regulation thereunder in a manner which in no way affected, prejudiced or interfered with the collection or payment of the federal tax, but simply construed state law adopted in the exercise of the sovereign power to tax, no aspect of this Court's certiorari jurisdiction is properly invoked here.

The City confuses a case in which a state court *applies a federal taxing statute* in a manner which has an impact upon federal revenues and/or collection procedures, with a case in which a state court *applies a local taxing ordinance and regulation* in a manner which has no impact upon federal revenues and/or collection procedures. To the extent that a state court in the latter situation makes gratuitous observations concerning federal laws, such observations are merely

academic exercises and will not attract the jurisdiction of this Court, since what is being applied and what is being affected is local law, not federal law.

The City objects to the observations made by the Pennsylvania Supreme Court concerning the federal gasoline excise tax; these include references to (1) statements by the President and Congress that the federal tax is a "user tax," and (2) the fact that refunds of the federal tax are available to certain purchasers when the gasoline is used on a farm for farm purposes. These observations concerning the federal tax contributed to the conclusion reached by the State Court that, *for purposes of the application of the Philadelphia Mercantile License tax ordinance and regulations,* the federal gasoline excise tax was essentially a sales tax which should not be added to Humble's receipts from sales of the product in order to exaggerate Humble's local tax base. *This characterization of the federal gasoline excise tax as a sales tax was solely for the purpose of determining a question of state law, namely the measure of tax under a local ordinance. Whether such characterization might or might not be accurate for some federal purpose should be left in the orderly process of our legal system to a future case in which the question can be squarely raised apart from considerations of local law.*

What standing in this Court do the observations by the State Court concerning the federal gasoline excise tax give to the City? Obviously, this Court is not going to disagree with statements by the President and Congress that the federal excise tax is a "user

tax." Nor is this Court going to determine that there exists no right of refund for farmers when in fact the statute confers such a right. What is left, then, is simply the State Court's conclusion that, *for purposes of a local taxing ordinance and regulations,* Humble's federal excise tax collections should not themselves be taxed by the municipality. With such conclusion this Court has neither the interest nor the competence to disagree. It has no interest because the federal government has no stake in the tax imposed by the City ordinance, and the question involved is purely and simply one of local law. It has no competence because *this Court cannot possibly know what weight was given by the State Court to the state law presumption in favor of the narrow construction of local taxing ordinances; nor can this Court know what other considerations of local law may have led the State Court to its holding.*

Thus, the City is here asking this Court to "correct" either the State Court's observations concerning the federal tax (which observations are factually unassailable) or the State Court's conclusion that the local tax base should not comprehend Humble's federal tax collections (which conclusion has nothing to do with federal revenue and presents no "federal question").

Obviously, this Court may not compel the Commonwealth of Pennsylvania, through one of its political subdivisions, to impose a local tax upon Humble where the highest court in the State has

declined to impose such a local tax. Nor may this Court be asked to engage in the futile exercise of advising the State Court how this Court might have decided this question of state law had this Court been a state court. Manifestly, this case ended when the State Court handed down its decision on March 14, 1967; *and the City has no business here requesting an advisory opinion.*

B. *The cases cited by the City demonstrate the City's inability to distinguish between the application by a state court of federal law on the one hand and the application of state law on the other.*

The City, in urging that this Court assert jurisdiction, relies upon *Awotin* v. *Atlas Exchange Bank,* 295 U.S. 209 (1935) and *People of the State of Illinois ex rel. Robert L. Gordon* v. *United States of America,* 328 U.S. 8 (1946). However, in both cases this Court granted certiorari where state courts had adjudicated questions pertaining to rights, privileges or immunities under federal statutes.

In *Awotin,* petitioner purchased from respondent, a national bank, bonds issued by a third party. Respondent agreed to repurchase such bonds at maturity at par. The question was whether a federal statute applied to prohibit a national bank from making such a guarantee. This Court held that it did. Obviously, the question as so decided was purely a federal question. Such is not the present case where there are no federally conferred rights, privileges or immunities,

and where the opinions expressed by the State Court about the federal statute were only for purposes of applying a local ordinance.

In *Gordon,* the question (as stated by the Court at page 9) was whether "tax claims of the Federal Government against an insolvent taxpayer must be satisfied in full before the State of Illinois can recover amounts due as taxes under its Unemployment Compensation Act." This Court asserted jurisdiction and held for the United States, which was a party to the litigation. In *Gordon,* federal priorities and federal dollars were involved. This is not so in the instant case where the State Court's comments respecting the federal act were solely for purposes of applying a municipal tax, and where no federal statute, policy, fund or collection procedure has been in any way affected by the result in the State Court.

C. *There is no conflict among the holdings of state court decisions in the area; and even if there were such conflict, there is no federal policy which favors, much less requires, uniformity in the exercise by the sovereign states of their taxing power.*

The City's petition observes that a number of state courts have considered whether federal gasoline excise tax collections should be subject to state sales taxes, state gross receipts taxes, state gross income taxes and local gross receipts taxes. No two of these cases were decided upon identical state statutes and regulatory provisions. Nor, obviously, were they de-

cided in the context of identical state and local conditions. Two[2] of the three cases cited by the City as being in "conflict" with the instant case did not involve the construction of a provision which (as in the present case) expressly removed excise taxes from the state or local tax base. The other case[3] involved a state tax (rather than a local tax) on gross income (rather than gross receipts).

But beyond these technical distinctions which negate conflict, the real point is that, even if a conflict existed in the application by various state courts of numerous state and local taxes, such conflict, no matter how serious as to matters of local law, would not raise a "federal question of substance" for purposes of this Court's certiorari jurisdiction.

Quite properly this Court has never attempted to supervise the local tax affairs of the nation's tens of thousands of municipalities, especially since municipalities not only share derivatively in the sovereignty of their respective states, but are also often shielded even from the states themselves by provisions for home rule or similar autonomy. Wisdom inheres in this practice because of the diversity of local ordinances and local problems.

The decision below involves no federal issue which requires a departure from the Court's past practice

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[2] *Pure Oil Co.* v. *Alabama*, 244 Ala. 258, 12 So. 2d 861 (1943); *Pure Oil Co.* v. *Joseph*, 295 N.Y. 1039, 73 N.E. 2d 911 (1947).

[3] *Sun Oil Co.* v. *Gross Income Tax Div.*, 238 Ind. 111, 149 N.E. 2d 115 (1958).

and a uniformity of determination at the expense of state statutes or decisions, and no strong federal policy would be carried out by assuring that each state law or city ordinance imposing a gross receipts tax, gross income tax or sales tax be subordinated to the strictures of a uniform definition regarding the incidence of federal gasoline excise tax.

Finally, there is the question whether the review sought by the City would in fact resolve the alleged conflict. What if the Court agreed with the City that, despite pronunciations by the President and Congress characterizing the federal gasoline excise tax as a "user tax," it was not in fact such a tax but was purely and simply a 26% gross receipts tax on the producer? It is questionable whether such a "victory" by the City would change the adjudications of those courts which have refused to mount their gross receipts taxes or sales taxes upon federal excise tax collections. Despite "clarification" by this Court, those jurisdictions would remain free in applying local law to resist so harsh a result as the pyramiding of gross receipts and sales taxes. Thus, as already noted, such a decision by this Court would be merely advisory, and then only as to the characterization of the federal tax, which is no more than a peripheral issue; for in every case the core issue involves the application of a state or local tax, and this core issue is beyond the jurisdiction and competence of the Court. Therefore, rather than render an academic dissertation on the general subject, it would certainly seem preferable for

this Court to await a justiciable controversy in which the point sought to be raised by the City is before the Court in a federal context, rather than intertwined with considerations of local law which could render this Court's decision pointless and futile.

We submit that what the City abhors as conflicts are merely various decisions of various sovereign jurisdictions concerning the application of different state and local taxes, that it is not this Court's function to oversee such taxes and render them uniform, and that a decision by this Court of the type sought by the City would be neither binding nor effective in bringing about the uniformity which the City purportedly desires.

D. *The holding of the Pennsylvania Supreme Court is completely in accord with certain decisions of this Court which were in fact cited by the State Supreme Court; the City's argument to the contrary is erroneous.*

Under Rule 19 it is necessary not only that "special and important reasons" exist for the granting of certiorari in respect of "a federal question of substance," but also that such federal question, as decided by the State Court, shall not have been "heretofore determined by this Court, or [shall have been decided by the State Court] in a way probably not in accord with applicable decisions of this Court."

We have already pointed out that, despite references to federal law, the question here is a local

question, not a federal question. We have also observed that, with tens of thousands of local taxing jurisdictions in this country, there are no "special and important reasons" for granting certiorari to review the application by a particular State Court of a specific local ordinance, since, due to different local provisions and conditions, any decision by this Court would be limited in its application to a single jurisdiction. Moreover, even as to such single jurisdiction, such decision as to a peripheral issue (the characterization of the federal gasoline excise tax) would be advisory at best, since this Court is not competent to decide the fundamental issue, namely the construction of a local ordinance and a regulation promulgated thereunder.

Thus, the City's arguments fail in respect of two of the three elements necessary to bottom the grant of certiorari. The City likewise fails to make out the third necessary element by an argument which attempts unsuccessfully to show that the Pennsylvania Supreme Court's decision is "probably not in accord with applicable decisions of this Court."

The two decisions of this Court, both of which were cited by the Pennsylvania Supreme Court in support of its opinion, which the City alleges are contrary to the very opinion which they are cited as supporting, are *Panhandle Oil Co.* v. *Mississippi ex rel. Knox,* 277 U.S. 218 (1928) and *Indian Motocycle Co.* v. *United States,* 283 U.S. 570 (1931). In those cases, this Court construed two excise taxes (neither of them the federal gasoline excise tax) and concluded

that they were sales taxes which, although payable by the seller, were collectible from the buyer who in fact bore the onus of the taxes. This fully accords with what the Pennsylvania Supreme Court held when it construed the City Mercantile License tax as inapplicable to Humble's federal gasoline excise tax collections.

Closer analysis of the City's argument reveals that it does not take exception, and cannot take exception, to the holding of the Pennsylvania Supreme Court as being inconsistent with *Panhandle* and *Indian Motocycle*. Instead, the City appears to object to what was, in the Pennsylvania Supreme Court case, merely dictum. By such dictum, the State Court, citing the President and Congress, expressed the view that the federal gasoline excise tax was a "user tax." This, says the City, is contrary to its reading of *Panhandle* and *Indian Motocycle* as imposing excise taxes upon "first sales." Of course, whether the federal gasoline excise tax is a user tax or is imposed upon first sales is of no consequence in the present litigation, since in either event it would be a sales tax in the view of the Pennsylvania Supreme Court for local gross receipts tax purposes; and in neither event for such purposes would it be part of Humble's gross receipts. The following review of *Panhandle* and *Indian Motocycle* will demonstrate that there is no discord between their holdings and the State Court holding in the present case.

In *Panhandle*, a state statute provided:

> "Any person engaged in the business of distributing gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of one cent ($.01) per gallon upon the sale of gasoline." At 220.

The plaintiff in *Panhandle* sold gasoline to the Coast Guard and a veterans hospital. The state claimed a tax on the sales. The plaintiff asserted that if the tax were directed at sales it was necessarily imposed upon the buyer; and since the buyer was the United States government, an unconstitutional burden resulted. The Court endorsed the plaintiff's argument on both counts. First the Court said:

> "To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale." At 222.

A tax on the sale is a tax on the buyer, said the Court, and:

> "It is immaterial that the seller and not the purchaser is required to report and make payment to the state." At 222.

Second, since the buyer was the United States, the Court held that the tax could not constitutionally be imposed. The second of these two holdings was subsequently overruled in *Alabama* v. *King & Boozer,* 314 U. S. 1 (1941). However, it is not the second holding which here concerns us, but rather this Court's endorsement of the plaintiff's first argument that a tax

measured by gallons sold is in effect a tax upon the sale and therefore upon the buyer. This pronouncement remains the law today.

The same result was reached in *Indian Motocycle,* where the taxing shoe was on the other foot. There the plaintiff sold a motorcycle to the City of Westfield. Section 600 of the Revenue Act of 1924, (ch. 234, § 600, 43 Stat. 322) provided:

> "There shall be levied, assessed, collected, and paid, upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—
>
> (1) . . . motorcycles . . . three per centum"

Because of the immunity issue, this Court had again first to face the question on whom the tax was imposed. On this point the Court said at page 574:

> "We think it [the tax] is laid on the sale, and on that alone . . . Counsel for the government base their contention on the requirement that the tax be paid by 'the manufacturer, producer, or importer'; but *we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first initial sales, and that it does not reflect a purpose to base the tax in any way on manufacture, production, or importation. . . .*" (Emphasis added.)

The Court then addressed itself to the immunity question which, as in *Panhandle,* is of no interest to the present inquiry.

Accordingly, it is fair to say that, in cases involving "federal questions," this Court views taxes similar to the instant one as imposed upon buyers and not upon sellers, despite the fact that for convenience sake such taxes are collected and paid over by sellers.

Obviously, the holding of the Pennsylvania Supreme Court in the instant case involving a question of local law parallels the decisions of this Court involving questions of federal law.

II. The Unanimous Decision of the Supreme Court of Pennsylvania correctly held that, within the intendment of the Philadelphia Mercantile License Tax Ordinance and Municipal Regulation, Federal Excise Taxes which are added to the Sales Price of gasoline and related products are "User Taxes" borne by the purchasers of such products and do not increase the Mercantile License Tax Base of the producer who collects and remits such excise taxes to the Federal Government.

A. The City ordinance and regulation.

It would be inappropriate in a brief opposing certiorari, particularly where the jurisdictional contentions of the petitioner are so extremely tenuous, to recite at length the many points which were presented to the State Supreme Court in the briefs and oral arguments. Accordingly, in this section some of the points will merely be noted and summarized and others will be omitted entirely.

The Philadelphia Mercantile License Tax Ordinance (Code of General Ordinances of the City of Philadelphia, ch. 19-1000) is imposed at the rate of 3 mills upon .

> "cash, credits and property of any kind or nature received in, or attributable to, Philadelphia from any business or by reason of any sale made or service rendered or commercial or business transaction occurring in Philadelphia . . . ."

Regulation 303(a)(4) (3 CCH PA. STATE TAX REPORTER 168-846) provides that the following taxes shall not be part of the tax base:

> "taxes collected as agent for the United States of America, Commonwealth of Pennsylvania or City of Philadelphia, where the customer or ultimate consumer pays the tax. *Such taxes shall include but not be limited to:*
>
> a. Federal taxes on admissions and dues
> b. Federal excise taxes on jewelry, furs and fur articles, toilet preparations and luggage
> c. Federal tax on transportation of property
> d. Federal tax on safe deposit boxes
> e. Pennsylvania liquid fuels tax
> f. City of Philadelphia amusement tax." (Emphasis added.)

We note first that, by reason of the italicized words, the enumerated taxes do not constitute a complete list of those which the City agrees are outside

the tax base. Thus the Regulation recognizes that other excise taxes in addition to the enumerated taxes are not includible in the base. Among the enumerated taxes are those applicable to jewelry and fur. Placed side by side the applicable sections of the Internal Revenue Code and the appropriate federal regulations are materially identical for jewelry and fur (enumerated) and for gasoline (not enumerated):

Jewelry Tax

Sec. 4001. "There is hereby imposed upon [certain] articles sold at retail a tax equivalent to 10 percent of the price for which so sold.

Regs. Sec. 48.4001-1(d). *Liability for tax.* The tax is payable by the person who sells at retail any article subject to tax. . . ."

Fur Tax

Sec. 4011. "There is hereby imposed upon [certain] articles sold at retail a tax equivalent to 10 percent of the price for which so sold.

Regs. Sec. 48.4011-1(f). *Liability for tax.* The tax is payable by the person who sells at retail any article subject to tax. . . ."

Gasoline Tax

Sec. 4081. "There is hereby imposed on gasoline sold by the producer . . . a tax of 4 cents per gallon.

Regs. Sec. 48.4081-1(c). *Liability for tax.* The tax . . . is payable by the producer . . . making the sale of the gasoline."

In short, all three of the above taxes are federal excise taxes; all three are *imposed on the sale* of certain commodities and all three are "payable" by the seller, whether manufacturer or retailer. The conclusion is irrestible that federal gasoline taxes are no more a part of a seller's mercantile license tax base than are federal jewelry and fur taxes. Faced with this dilemma, the City took the position at the hearing that its own regulation was in error (R. 10a)! The City's attempted disavowal of its own regulation is certainly the best proof of its application here. Apparently, the Pennsylvania Supreme Court chose not to accept the City's disavowal.

As already noted, the federal gasoline excise tax of 4 cents per gallon is equal to 26% of the wholesale cost of the product itself (Exhibit P-1, R. 22a), and it is interesting that of the ten excise taxes listed by the City's regulation as illustrative of taxes not included in the tax base, all but one (the Pennsylvania liquid fuels tax) are less in relation to the cost of the commodity than are federal excise taxes on gasoline and other petroleum products. To permit the omission from the tax base of lesser excise taxes while requiring the inclusion of greater excise taxes is arbitrary, inequitable, illegal and violative of the requirement contained in Article IX, Section 1 of the Constitution of Pennsylvania that "all taxes shall be uniform. . . ."

B. *Considerations of Pennsylvania Law.*

It is axiomatic in the Commonwealth of Pennsylvania that state and local taxing statutes and ordinances must be strictly construed against the taxing authorities and favorably to the taxpayer. Statutory Construction Act, Act of May 28, 1937, P. L. 1019, 46 PURD. PA. STAT. ANN. § 558 (1952). The burden is on the proponents of the tax to prove coverage, *Arbuckle's Estate,* 324 Pa. 501, 505 (1936); no tax may be levied in the absence of clear and unmistakable language imposing it, *Commonwealth* v. *Allied Building Credits, Inc.,* 385 Pa. 370, 376 (1956); and all doubts must be resolved in favor of the taxpayer, *Tax Review Board* v. *Green,* 409 Pa. 448, 454 (1963), *Pickering Estate,* 410 Pa. 638, 648 (1963), *Don Allen Chevrolet Co.* v. *Pittsburgh,* 414 Pa. 429, 433 (1964).

In addition, it should be borne in mind that the Philadelphia Mercantile License tax has been held to be an especially "onerous tax." *Lefferts, et al.* v. *City of Philadelphia,* 88 Pa. D. & C. 345, 350 (C. P. Phila. 1953). In cases involving this tax the courts will apply an even more stringent test than is employed in dealing with less burdensome taxes. In *Lefferts* (a case concerning the application of the Philadelphia Mercantile License tax) the court stated:

> ". . . the courts will use an entirely different standard in adjudicating a gross income tax, since such a tax is one burdening every transaction entered into, whether the transaction is

profitable or not and is not merely a tax on property that constitutes the profits of an enterprise." At 355-56.

Obviously, the standards which the Pennsylvania courts apply in determining the reach of a tax such as the City's Mercantile License tax are extremely stringent. It was natural, therefore, that the City would encounter resistance from the Pennsylvania Supreme Court in the City's attempt to add insult to injury by applying its local gross receipts tax to federal gasoline excise taxes which are enormous,[4] burdensome to collect, and regressive in their effect upon sales of gasoline.[5] *Indeed, the ambiguity of the City's position, coupled with the City's suggestion that its own regulation was erroneous, would have been enough, considering the burdens imposed upon local taxing authorities seeking to apply "onerous" gross receipts taxes in Pennsylvania, to have turned the tide in Humble's favor.*

C. *Considerations of General Law.*

It is recognized that gross receipts taxes by definition allow for no relief from income taxes, capital stock taxes, franchise taxes and even from other gross receipts taxes. But excise taxes of the instant type are fundamentally different in nature from those taxes which constitute costs of doing business and are

[4] They amounted to $2,618,000,000 in 1964. Johnson, *Excise Tax Reductions and Consumption Expenditures,* TAXES, 395 *et seq.* (1965).

[5] *Id.*

measured by profit, net worth or receipts. Excise taxes are essentially sales taxes on specific commodities. As such they are not part of the price of goods sold, but are a separate, distinct and additional charge imposed by law upon the transfer of property in a particular commodity. Such taxes are borne by buyers and are merely collected and remitted by sellers. Their nature and generally their size prevent their being absorbed by sellers and treated simply as costs to sellers of doing business.

In *Eugene Theater Co. et al.* v. *City of Eugene et al.*, 194 Oregon 603, 243 P.2d 1060 (1952), the court characterized excise taxes as follows:

> ". . . an excise is 'something cut off from the price paid on a sale of goods, as a contribution to the support of the government'. Buckstaff Bath House Co. *v.* McKinley, 198 Ark. 91, 127 S.W.2d 802, 806; Shanks *v.* Kentucky Independent Oil Co., 225 Ky. 308, 8 S.W.2d 383; 26 RCL, Taxation, 34, § 18. An admissions or sales tax is *not paid by the person who operates the business. He simply collects it from his patron or customer and later delivers it to the taxing agency. Thus it is the patron or customer who actually pays taxes of the type.* The 'take home' money of the operator of the business is not thereby reduced. . . ." At 1072. (Emphasis added.)

In the *Eugene* case the court had before it a tax "measured and determined by computing three per cent (3%) upon the total of the admission charges,

less all other taxes, collected by the licensee." The question was whether such tax was an occupation tax, which the municipality had the authority to levy, or an excise tax, which it did not have the authority to levy. The municipality argued (as does the City in the present case) that it was not an excise tax, since it did not contain a specific requirement "that the tax imposed be collected from the purchaser." The court rejected this argument and held that the tax was an excise tax, and that such a tax by its nature is collected by the seller, that it "never becomes the property of the [seller]," and that "the right and ownership of the [taxing authority] attaches immediately." At 1073.

Gasoline is a favorite commodity upon which excise taxes are imposed by a variety of taxing authorities.

> "It is a common and entirely lawful arrangement for the state to impose an excise or use tax on motor fuel used or otherwise disposed of within the state and collect the tax, not from the user through its own tax collection officers, but *from the dealer or distributor, who is in effect made the agent of the state for that purpose. He is, however, a collector of taxes rather than a taxpayer. . . .*" 51 AM. JUR. *Taxation* § 1277 (1944). (Emphasis added.)

The City blinds itself not only to these considerations of general law, but also to the economics of the situation. In Pennsylvania the wholesale price of stand-

ard grade gasoline is .153 cents per gallon, and the applicable excise taxes are .11 cents per gallon (Exhibit P-1, R. 22a). Thus, excise taxes on gasoline are equal to 71% of the cost of the product itself. The Pennsylvania tax of 7 cents per gallon is equal to 45%of the cost of the product; and, as already noted, the federal tax of 4 cents per gallon is equal to 26% of the cost. Can the City seriously contend that taxes of such magnitude are merely costs to gasoline producers of doing business?[6] If, as a matter of economics, the Pennsylvania sales tax of 5%, which is small when compared with gasoline excise taxes, should be (and is) borne by buyers of taxable goods and is not added to the Mercantile License tax base, then a *fortiori* gasoline excise taxes, which are many times larger than the Pennsylvania sales tax, must in any realistic appraisal of the matter be so borne.

D. *The federal statute, its Congressional characterization and its interpretation by federal agencies.*

As already quoted, the federal gasoline excise tax levied by Section 4081 of the Internal Revenue Code of 1954 provides in material part as follows:

> "There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4¢ a gallon."

[6] Effective September 30, 1959, the Federal gasoline excise tax was increased from 3 cents to 4 cents per gallon. Under the City's theory, this change would result automatically in increasing Humble's mercantile tax liability by approximately 6%, despite the fact that Humble's real receipts from the sale of gasoline remained unchanged.

It should be noted that the operative word here is "sold," not manufactured or produced. By comparison, certain other federal excise taxes are specifically imposed upon manufacture and production.[7] Accordingly, the federal gasoline excise tax is a sales tax on a specific commodity.

The revenue raised by the federal gasoline excise tax does not go into the general treasury. Instead it goes into a special trust fund and is used to defray the cost of the federal highway program.[8] There can be no doubt that the tax was designed to be imposed upon motorists who purchase gasoline and is so imposed in order to provide such taxpayers with highways.

(1) PRONOUNCEMENTS OF THE PRESIDENT AND CONGRESS. In fact, the President of the United States in his May 17, 1965 message to Congress concerning excise tax reform stated:

> "*Users* of highways come closer to *reimbursing* the federal government for its transportation investment than any other group."[9] (Emphasis added.)

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[7] Section 5701 of the Internal Revenue Code provided:

> "On tobacco, manufactured in or imported into the United States there shall be imposed. . . ."

Section 5001 of the Internal Revenue Code provides:

> "There is hereby imposed on all distilled spirits in bond or produced in or imported into the United States. . . ."

[8] Federal-Aid Highway Act of 1956, Act of June 29, 1956, Tit. II, ch. 462, § 209, 70 Stat. 397, *as amended by* Act of June 21, 1962, Tit. VIII, § 809 (c), 79 Stat. 144, 168, 23 U.S.C.A. § 120 Historical Note.

[9] 6 U. S. CODE CONG. & AD. NEWS 890, June 20, 1965.

Even more to the point, Congress has characterized gasoline excise taxes as being *assessed on users in proportion to their use of the highway:*

> *"Taxes such as those on gasoline . . . are user taxes. They serve to assess to users* of, and, therefore, the primary beneficiaries of, certain Government facilities and programs a part of the cost to the taxpaying public of providing the facilities. For example, those who use the public highways benefit from the Government's contribution to highway construction. *A tax on gasoline taxes users* of the highways in rough proportion to their use of service."[10] (Emphasis added.)

Certainly the Congressional characterization of a federal tax is controlling and may not be impugned by the City.

(2) EXEMPTIONS FOR PARTICULAR USERS. The federal gasoline tax exempts certain users from its application. Section 4221 of the Internal Revenue Code of 1954 provides that no such tax shall be imposed upon sales "for export," or "for use by the purchaser as supplies for vessels or aircraft," or "to a State or local government," or "to a non-profit educational organization." If, as the City argues, the taxes in question are upon the *seller* it would make no sense to exempt certain *buyers* from their application.

(3) REFUNDS FOR PARTICULAR USERS. It would make even less sense to provide for the payment of

[10] Report of the House Ways and Means Committee on H. R. 8371, 89th Cong., 1st Sess. (1965), at 1070-71.

refunds to certain users if, as the City contends, the taxes in question are laid upon the producer. Yet this is precisely what the Code does. Section 6420 (a) states:

> "[If] gasoline is used on a farm for farming purposes, the Secretary . . . shall pay . . . to the ultimate purchaser of such gasoline the amount determined by multiplying—
>
> (1) the number of gallons so used, by
>
> (2) the rate of tax on gasoline under Section 4081 which applied on the date he purchased such gasoline."

Internal Revenue Service publication No. 308, 6-61 (CCH Federal Excise Tax Rep. 1336.01) states:

> ***"FARMERS GAS TAX REFUND"***
>
> *Who may claim a refund.* The owner, tenant or operator of a farm who buys gasoline for use on a farm.
>
> * * * *
>
> ***REFUND OF FEDERAL EXCISE TAX ON GASOLINE USED ON A FARM FOR FARMING PURPOSES***
>
> To get a refund of Federal gasoline tax you must file a claim on Form 2240. When you purchase the gasoline, *the price you pay includes the Federal gasoline tax, and you may claim a refund* of the tax on any gasoline which is used on a farm for farming purposes." (Emphasis added.)

It could not be clearer that what the farmer receives is a *refund* of the federal gasoline excise tax which *he has paid* measured by the number of gallons he has purchased multiplied by the tax rate in effect at the time of the purchase. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged), G. & C. Merriam Co., 1963, defines *refund* in material part as follows:

> "to give or put back . . . to return (money) in restitution, repayment. . . ."

The word "refund" forecloses the City's argument that the taxes in question are imposed upon and borne by the seller. The word refund presupposes that such taxes have been paid by the buyer and that they are being restored to the buyer. Taxes cannot be "refunded" to someone who never paid them.

In addition to total refunds, partial refunds are directed by I.R.C. Section 6421 (b) for local transit systems. Section 6421 (f) provides that the refunds allowed shall be treated "as if such payments constituted refunds of *overpayments* of the tax so imposed." (Emphasis added.) Obviously for there to have been an overpayment of tax, there must have been a *payment* by the buyer of the tax in the first place.

(4) THE BOND REQUIREMENT. Section 4101 provides that a seller must register and post bond. It would be extraordinary to require a taxpayer to secure by the bond of a third party the taxpayer's

obligation to pay his own taxes. On the other hand, it is perfectly normal to require that a person handling or collecting the money of another post bond to secure the collection, remission and accounting for such funds. Section 48.4101-1(c)(1) of the Regulations provides in part:

> "Such bond shall be conditioned that the principal shall not engage in any attempt, by himself or by collusion with others, to defraud the United States of any tax under Section 4081 or 4091; that he shall render truly and completely all returns. . . ."

The language used in the bond bespeaks a kind of fiduciary or at least agency relationship, not a debtor-creditor relationship.[11]

(5) COLLECTION PROCEDURES. The testimony shows that the federal excise taxes which Humble collects from its customers must be placed in separate accounts in depositary banks, that depositary receipts are issued by the Federal Reserve Bank covering such deposits, and that quarterly returns are filed together with such depositary receipts (R. 18a). As noted, the procedure is the same as where an employer withholds payroll taxes from his employees which he then remits to the Internal Revenue Service by placing same in designated depositaries (R. 7a). In both cases the depositor accounts for and remits

[11] Although the bonding requirement was recently deleted by the Excise Tax Reduction Act of 1965, Act of June 21, 1965 § 802, 79 Stat. 136 (1965), 26 U.S.C. §§ 4082(b)(2), 4101, it was in effect during the tax years in question and evidenced Congressional intent concerning the existence of a fiduciary or at least agency relationship.

taxes collected from third parties, in one case from employees and in the other case from purchasers of gasoline.

(6) SPECIAL RULES APPLICABLE TO THE TIME WHEN EXCISE TAX ATTACH. Revenue Ruling 56-361 (1956-2 CUM. BULL. 794) holds that the excise taxes in question attach when title passes. If such taxes were imposed, as the City seems to contend, upon the producer's receipts, there would be no need for a special provision concerning the time when the taxes attach. That such taxes attach when title passes is further evidence of their true nature as sales taxes upon the transfer of goods and not upon the producer's revenue from sales. The Revenue Ruling parallels the Pennsylvania sales and use tax which renders taxable "the acquisition . . . of the ownership, custody or possession of tangible personal property . . . ." Tax Act of 1963 for Education, Act of May 29, 1963, P. L. 49, § 2(e)(1), 72 PURD. PA. STAT. ANN. § 3403-2(e)(1) (Supp. 1966).

(7) INTERSTATE COMMERCE COMMISSION REPORTS. Exhibit P-3 (Annual Report of Motor Carriers to the Interstate Commerce Commission) shows that the Interstate Commerce Commission regards federal gasoline excise taxes as paid by buyers of gasoline. The Annual Report refers on page 43B to costs of "fuel for revenue equipment" (Uniform System of Accounts, category 4250). Then on page 47, such report requires the segregation of "the amount paid to the Federal Government" representing "gasoline,

other fuel and oil taxes" (Uniform System of Accounts, category 5210). This latter category would make no sense were the user of the fuel not in fact the real taxpayer and the producer merely the collection instrumentality (R. 22a).

(8) THE WAGE AND HOUR TEST. An Interpretative Bulletin promulgated by the Department of Labor effective September 3, 1961, deals with the coverage of the Fair Labor Standards Act as applied *inter alia* to gasoline service stations (29 C.F.R. § 779.257-.266 (1967); 1 CCH WAGES AND HOURS ¶ 24,105.257-.266). For purposes of calculating the gross volume of a service station's sales to determine coverage, the Department has held that taxes "imposed at the retail level" shall not be treated as receipts of the "establishment," and that federal excise taxes on gasoline and related products are "taxes imposed at the retail level." Sec. 779.265 of the Bulletin states in material part:

> ". . . the circumstances surrounding the levying and collection of the federal excise tax on gasoline reflect that although they are listed under the title of 'Manufacturers Excise Taxes', they are, in practical operation, taxes 'at the retail level.'"[12]

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[12] A question was raised at the Tax Review Board hearing why federal gasoline excise taxes are not deductible by consumers, assuming that such taxes are borne at the retail level (R.9a). The answer, as there given, was that I.R.C. Sec. 164 disallows the deduction of "Federal excise . . . taxes . . . (unless) deducted under Section 162 (relating to trade or business expenses)," etc. Presumably there would have been no need to disallow the deduction of such taxes were it not for the fact that they are actually borne at the retail level.

E. *Summary of Humble's arguments in the Pennsylvania Supreme Court.*

The question before the Pennsylvania Supreme Court was whether the Philadelphia Mercantile License tax—which the Pennsylvania courts have held is an especially onerous tax to be scrutinized carefully in its application—should be levied not only on Humble's gross receipts from sales of gasoline, but also on monies that Humble collects from its customers in the form of the federal gasoline excise tax, which is imposed at the rate of 4 cents per gallon of gasoline "sold" and is equal to 26% of the wholesale price of the commodity.

Humble cited a municipal regulation which excluded federal, state and local excise taxes from the City tax base. This regulation expressly provided that exclusion from the City tax base should *not* be limited to certain enumerated taxes, including federal excise taxes levied on jewelry and fur. And since such enumerated taxes were not materially distinguishable from the federal gasoline excise tax, Humble argued that the City could not require inclusion in the City tax base of the gasoline tax while permitting exclusion of the jewelry and fur taxes. The City was forced to concede that the three taxes were not materially distinguishable. The City then sought to repudiate its own regulation (R 10a).

Humble further argued that excise taxes are by nature sales taxes on specific commodities, that as such

they are collectible by sellers from their customers, and that as collected they are not the funds of the seller but are irrevocably committed to the taxing authority. Specifically concerning the federal gasoline excise tax, Humble noted that producers were required to post bond to cover their liability for collections, and that they had to remit monthly the taxes which they collected to the federal government by obtaining depository receipts in the same manner as employers remit federal employment taxes which they withhold and collect from their employees.

In addition, Humble cited provisions of the federal gasoline excise tax statute which exempt certain buyers from the tax, and Humble argued that such exemptions would be meaningless if the tax were not in fact imposed upon buyers. In the same manner, Humble cited other provisions of the federal statute which authorize refunds to certain buyers, and again Humble argued that the refund provisions would be meaningless if in fact the tax were not imposed upon buyers.

Humble noted that both the President and Congress have declared that federal gasoline excise taxes are "assessed to users" for the federal highway construction program, so that they are necessarily taxes which are collected and paid over by producers, not taxes which are borne by producers.

Finally, Humble referred to the Pennsylvania doctrine that state and local taxes should be narrowly construed, that the burden of proving coverage was

on the taxing authority, and that all doubts should be resolved in favor of the taxpayer. Considering the nature of the federal gasoline excise tax as well as the ambiguity of the City's position concerning its own regulation, Humble asserted that the City tax should apply only to the producer's receipts from sales of gasoline and should not apply to the huge federal excise taxes which are superimposed upon transfers of property in gasoline and which the reluctant producer is compelled to collect and remit to the federal government at considerable expense and no gain to himself.

CONCLUSION

For all the foregoing reasons, the City's petition for writ of certiorari should be denied.

Respectfully submitted,

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